91-1466

Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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RICHARD MIRABAL - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

A. WHETHER THE ELEVENTH CIRCUIT'S FAILURE TO DETERMINE THAT A GOVERNMENT AGENT'S COMMENT ON PETITIONER'S SILENCE IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS NOT HARMLESS BEYOND A REASONABLE DOUBT REQUIRES AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

## TABLE OF CONTENTS


Page

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TABLE OF AUTHORITIES CITED (iv)

I. OPINION BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL PROVISIONS INVOLVED 2

IV. STATEMENT OF FACTS 3

V. REASONS FOR GRANTING THE WRIT 13

A. THE ELEVENTH CIRCUIT'S FAILURE TO DETERMINE THAT A GOVERNMENT AGENT'S COMMENT ON PETITIONER'S SILENCE IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS NOT HARMLESS BEYOND A REASONABLE DOUBT REQUIRES AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

VI. CONCLUSION 24

VII. APPENDIX 25
(Appellate decision.)

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S. Ct. 824 (1967) | 19 |
| Doyle v. Ohio, 426 U.S. 610, 491 L. ED. 2d 1, 96 S. CT. 2240 (1976) | 20-21 |
| Fahy v. Connecticut, 375 U.S. 85, 11 L. ED. 2d 171, 84 S. CT. 229 (1963) | 19 |
| Mesarosh v. U.S., 352 U.S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1 (1956) | 15 |
| Stewart v. U.S., 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84, (1961) | 17 |
| U.S. v. Hale, 422 U.S. 71, 45 L. ED. 2d 99, 95 S. CT. 2133 (1975) | 15,21 |
| U.S. V. Hasting, 461 U.S. 499, 76 L. ED. 2d 96, 103 S. Ct. 1974 (1983) | 19 |
| U.S. v. Payner, 447 U.S. 727, 65 L. Ed. 2d 468, 100 S. Ct. | 15 |
| U.S. v. Harp, 536 F. 2d 601 (5th Cir. 1976) | 21 |
| U.S. v. Impson, 531 F. 2d 274 (5th Cir. 1976) | 21 |

U.S. v. Mena, 863 F. 2d 1522 (11th Cir. 1989) 21

U.S. v. Rosenthal, 793 F. 2d 1214 (11th Cir. 1986) 21,22

U.S. v. Stevens, 538 F. 2d 1203 (5th Cir. 1976) 21

## RULES AND STATUTES

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 3

## OTHER SOURCES

Fifth Amendment of United States Constitution 2,16,21

Sixth Amendment of United States Constitution 2

PETITION FOR WRIT OF CERTIORARI
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Petitioner, RICHARD MIRABAL, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled cause on December 5,1991.

I.

OPINION BELOW

The per curiam affirmed decision of the Court of Appeals is attached as page 1 of the Appendix. No opinion was issued by the district court for the Southern District of Florida. A petition for rehearing was not filed.

## II.

## JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit was filed on December 5,1991. The mandate was issued on January 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## III.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

## IV.

## STATEMENT OF FACTS

Petitioner was charged by indictment with conspiracy to distribute and with the distribution of cocaine. The case proceeded to trial on July 18-20,1990 and the Petitioner was convicted and sentenced to imprisonment for 188 months. The conviction was reviewed and affirmed by the Eleventh Circuit Court of Appeals after a direct appeal pursuant to 28 U.S.C. §1291.

An individual by the name of Modesto Viada was arrested in August of 1989 in Miami for involvement in the importation of 600 kilograms of cocaine and faced a

minimum sentence of 20 years without parole. Viada was subsequently released in November of 1989 to cooperate with the Government concerning narcotics trafficking. Viada had entered into a plea agreement with the prospect of a reduced sentence related to the degree of his cooperation. In his activities, Viada was supervised by U.S. customs agent Harold Joseph Wilson.

On November 26,1989, Viada first met with Petitioner who became the focus of Viada's efforts. The meeting took place at Viada's residence. During their conversation, reference was made to a truck and driver going from Miami to California to pick up three to four hundred pieces of merchandise. Later, Agent Wilson found a piece of paper in the room with road directions written on

it. The handwriting was never analyzed although Petitioner's fingerprints were on the document.

At this meeting and over a successive two week period, numerous conversations between Viada and the Petitioner were taped. There were continuing discussions about money and the driver. Petitioner also had cryptic phone calls with other individuals. Nothing ever appeared certain or decided. During this time, Viada claimed to have received $800, $700, and $2,300 from Petitioner, although no fingerprints were ever found on the money and Viada and the areas about him had not been thoroughly searched on each respective occasion.

There were at least thirty phone calls and three meetings. About fifteen of the phone conversations were taped.

The meetings were taped using a KEL monitoring device. It is normal for tapes from KEL units to be of poor quality. These units often cut out and miss conversations due to various factors and conditions which cause interference.

Tapes of the three meetings and eleven of the conversations were introduced into evidence. These recorded conversations were very difficult to decipher and their precise meaning unclear and subject to interpretation. Several portions of the tapes were unintelligible.

The confidential informant, Modesto Viada, did not testify at the trial but had apparently fled. The evidence against the Petitioner consisted primarily of theses tapes. The trial judge himself admitted that he had

difficulty following the tapes. Most of the conversation appeared to be in code or about something other than drugs. Often, Petitioner or Viada would ask the other if he understood or knew what was meant. In one recorded conversation an indirect reference to drugs was mentioned and that was done so by Viada. This was the only time drugs were ever mentioned.

The Petitioner stated at one point in a telephone conversation on December 8,1989 that he was "no longer interested in anything". Eventually, Viada and two individuals met on that date and 17 kilograms of cocaine were transferred to Viada. There two men were never identified. Petitioner was not present at the transfer. However, about one week thereafter, Petitioner was arrested.

Other evidence at the trial included

the two government agents who performed surveillance at several of the meetings between Viada and Petitioner, the cash, the road directions, surveillance photographs, and the cocaine.

During the trial, Agent Wilson commented on Petitioner's silence during cross examination by Petitioner's attorney:

> Q. Now according to what you told Modesta Viada told you that on a number of occasions during the course of his undercover informant activity, he told you that he had conversations with Richard Mirabal, which unfortunately he directed to Mr. Mirabal or which he claimed Mr. Mirabal

directed to him at a time when you were not with Mr. Viada and, therefore, the calls did not get recorded, am I right?

A. He told--

Q. He told you that?

A. Mr. Viada said he told me that he had received calls, and that-

Q. From Mr. Mirabal?

A. -- and we were not present.

Q. Or that he called Mr. Mirabal and spoke with him and you were not present?

A. At first I directed

him not to call
Mr. Mirabal unless
we were present and he
remarked that it would
be impossible at times
to do that because he
would get a beep and he
would have to call sometimes
pretty quickly back.

Q. So we would only have
Modesto Viada's word for
what was said in those
conversations, am I right?

A. Well, Mr. Mirabal
would like to tell us,
too, I guess. (emphasis added)

Mr. Tunkey: I reserve a motion.

A. I'm sorry, essentially
if Mr. Viada was here--

Q. You know because you

are a trained law enforcement officer and you have testified, I'm sure, on many occasions, do you know that Mr. Mirabal or anybody who is accused of a crime has no obligation to testify, don't you?

A. Exactly.

Q. You know that?

A. Yes, sir.

Q. And you know that it is your job and the job of the U.S. Attorney that if you could expect a quilty in this case, you must prove Mr. Mirabal quilty beyond a reasonable doubt, and

you know that, too,
don't you?
A. Yes.
Q. Now, then, both to
you or to this jury,
if I were to ask you
--in other words, if
I were to ask you,
Special Agent, what did
Mr. Viada say was the
conversation or what
were the nature of the
conversations that he
claims he had with Mr.
Mirabal on those times
when you were not there
to tape him, we would
only have Mr. Viada's word,
or, as you put it,
Mr. Mirabal's word for what

happened in those

conversations, right?

A. That's correct.

The trial judge acknowledged at the time the comment was made and at the sentencing that the agent had committed error. The defense counsel for the petitioner immediately reserved a motion for mistrial. A curative instruction was declined so as to not bring added emphasis to the agent's comment. Repeated motions for a mistrial and a new trial were denied.

V.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S FAILURE TO DETERMINE THAT A GOVERNMENT AGENT'S COMMENT ON PETITIONER'S SILENCE IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-

INCRIMINATION AND SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS NOT HARMLESS BEYOND A REASONABLE DOUBT REQUIRES AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The Eleventh Circuit, by virtue of a per curiam affirmed decision with no written opinion, should not be permitted to ignore fundamental violations of constitutional rights. Petitioner's right to remain silent and right to a fair trial were violated when Agent Wilson commented about Petitioner not testifying. The constitutional errors were not harmless beyond a reasonable doubt and could not be otherwise in a case where the evidence was not overwhelming. Although drug cases are unpopular, the federal courts cannot sanction the prosecution of trials in

which constitutional rights are violated.

The violations were harmful and prejudicial and this court should exercise its power of supervision and issue a Writ of Certiorari. The Supreme Court may use its supervisory powers over the federal courts to correct prejudicial error in the trial court, U.S. v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975), and to protect judicial integrity and see that the waters of justice are not polluted. Mesarosh v. U.S., 352 U.S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1 (1956) and U.S. v. Payner, 447 U.S. 727, 65 L. Ed. 2d 468, 100 S. Ct. 2439 (1980). Upon fully briefing this case on the merits, Petitioner will clearly and unequivocally demonstrate to this court that Petitioner deserves a new trial.

The statement by Agent Wilson was an

impermissible comment on the exercise of Petitioner's Fifth Amendment right to remain silent and it violated his right to a fair trial. The comment was not invited, but in response to a question which called for a yes or no answer. It was prejudicial. The testimony, in the manner in which it was presented, reflected on the Petitioner's silence at trial. When Petitioner did not testify and continued to exercise his right to remain silent, an inference of guilt by the jury was a possible, perhaps probable consequence. Since the evidence against the Petitioner was not overwhelming, it is likely that Agent Wilson's testimony affected the verdict.

The defense declined a curative instruction. This was done so that agent Wilson's testimony would not be

emphasized. See Stewart v. U.S., 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961). Trial counsel attempted to cure the harm through subsequent cross examination of Agent Wilson. Repeated motions for a mistrial and a new trial were denied. The court however recognized at trial when discussing the first motion for a mistrial and again at sentencing, when ruling on a motion for a new trial, that error had occurred. Agent Wilson also apologized to the court for his comment and admitted that it was a mistake.

The impermissible comment by Agent Wilson occurred when he was being cross examined about statements that Viada claimed Petitioner made in unrecorded private conversations between them. Petitioner's trial counsel was attempting

to discredit Viada as unreliable and not worthy of trust. Agent Wilson, in effect, suggested that Petitioner could take the stand and refute Viada's statements to the Government agents. The unquestioned inference in the minds of the jury was that Petitioner must be guilty if he did not testify. Petitioner's defense was clearly and unequivocally undercut and undermined by Agent Wilson's impermissible comment, brief as it was.

There is no question but that Agent Wilson's testimony violated Petitioner's constitutional right to remain silent and right to a fair trial. Once constitutional error occurs during a trial, a mistrial or a new trial must be ordered unless the error is harmless. Before a federal constitutional error can be held harmless, the court must be able

to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). The question is whether there is a reasonable possibility that the constitutional error complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963).

The evidence against Petitioner was not overwhelming and therefore the error committed by Agent Wilson could not reasonably be determined to be harmless beyond a reasonable doubt. U.S. v. Hasting, 461 U.S. 499, 76 L. Ed. 2d 96, 103 S. Ct. 1974 (1983). Most of the evidence at trial consisted of taped conversations between Viada and Petitioner. The Government was left to

rely primarily on these ambiguous tapes because Viada did not testify at trial but had apparently fled.

The recorded conversations were difficult to understand and comprehend and were often unintelligible. This was not an open and shut case. The jury did not render a prompt verdict but deliberated for approximately six hours.

The error was highly prejudicial and went to the heart of the defense which was an attack on Viada's reliability, credibility and truthfulness. The error was clearly harmful to Petitioner's case and a violation of his constitutional rights. It is fundamentally unfair to simultaneously afford a suspect a constitutional right to silence and yet allow the implications of that silence to be used against him. Doyle v. Ohio, 426

U.S. 610, 491 L. Ed. 2d 1, 96 S. Ct. 2240 (1976). See also U.S. v. Hale, 422 U.S. 71, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975).

The Eleventh Circuit has determined that virtually any description of a Defendant's silence following arrest and a Miranda warning constitutes a violation of the Fifth Amendment right to remain silent. U.S. v. Rosenthal , 793 F. 2d 1214 ( 11th Cir 1986). Agent Wilson had "an institutional interest" in the Petitioner being found guilty and in such cases reversible error is often found as a matter of course, U.S. v. Mena, 863 F. 2d 1522 (11th Cir 1989), U.S. v. Stevens, 538 F. 2d 1203 (5th Cir 1976), U.S. v. Harp, 536 f. 2d 601( 5th Cir 1976), even after a curative instruction. U.S. v. Impson, 531 F. 2d 274 (5th Cir 1976).

If a statement was manifestly intended to refer to the Defendant's silence or was of such a character that a jury would naturally and necessarily take it to be a comment on the Defendant's silence, it is error. U.S. v. Rosenthal, supra.

The Eleventh Circuit should not be permitted to essentially brush aside violations of Petitioner's constitutional rights. This was a close case and the error was not harmless beyond a reasonable doubt. The Writ of Certiorari should issue. A new trial is justified.

## VI.

## CONCLUSION

The fairness, integrity and public reputation of the judicial proceedings were infected by Agent Wilson's comments concerning the Petitioner's silence. The

improper testimony from the Government agent was prejudicial and went to the heart of the defense. It was not harmless beyond a reasonable doubt. The evidence against Petitioner was not overwhelming. It consisted almost exclusively of ambiguous taped conversations which were very difficult to follow as acknowledged by the trial judge. The informant did not testify at trial. The jury deliberated for approximately six hours. This court should exercise its power of supervision over the Eleventh Circuit and not permit such violations of Petitioner's fundamental constitutional rights to be ignored by the issuance of a per curiam affirmed with no opinion. The Writ of Certiorari should issue and Petitioner be permitted to brief this case on the

merits.

Respectfully submitted,

This 4th day of

March, 1992.

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# VII.

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 90-5854
Non-Argument Calendar

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D.C. Docket No. 90-0006-CR-EBD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD MIRABAL,

Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of Florida

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(December 5, 1991)

Before HATCHETT, Circuit Judge, JOHNSON and CLARK, Senior Circuit Judges.

Per Curiam: Affirmed. See 11th Cir. R 36-1.